REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Reportable: Yes
Of Interest to other Judges: Yes

1 December 2023 Vally J

CASE NO: 2022-007672

In the matter between:

REGIMENTS FUND MANAGERS (PTY) LTD	First Applicant
REGIMENTS SECURITIES (PTY) LTD	Second Applicant
ASH BROOK INVESTMENTS 15 (PTY) LTD	Third Applicant
CORAL LAGOON INVESTMENTS 194 (PTY) LTD	Fourth Applicant
and	
EUGENE NEL N.O.	First Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent

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JUDGMENT

Vally J

Introduction

[1] On 19 November 2019, upon application *ex parte* and *in camera* by the second respondent, the National Director of Public Prosecutions (NDPP), Wright J made a provisional order under s 26 of the Prevention of Organised Crime Act, 121 of 1998 (POCA) restraining the applicants and other persons and entities from dealing in any manner with property belonging to the

applicants and the other entities, except in terms of the order (Order). The applicants were thus divested of use, possession, control of, and 'dealing in', their property. The property was placed in the hands of a *curator bonis* (curator). The property that he was to take possession of includes, amongst others, 'all property held by legal representatives on behalf of any defendant, in trust or in any other way whether received from the defendant or a third party on behalf of the defendants, at any time after the granting of this order.'[1]

[2] The first respondent was appointed as curator to take charge and manage the affairs of the applicants and the other entities that were subject to the Order. The applicants and others opposed the confirmation of the Order. They were successful before a single bench of this court. The NDPP appealed to the full bench of this court. She was successful. The applicants have applied to the Supreme Court of Appeal (SCA) for leave to appeal the Order of the full bench. In the meantime, they seek an order from this court declaring that the curator is entitled, in terms of paragraphs 11 or paragraph 20 of Annexure B of the Order, to pay the litigation costs relating to the restrained assets. Their case is that the Order read literally as a whole allows the curator to pay these litigation costs. They seek that the curator pay the litigation costs in the following matters:

[2.1] a tax dispute between the second, third and fourth applicants and the South African Revenue Service (SARS);

[1] Paragraph 2.3 of the Order.

[2.2] a dispute between the third and fourth applicants and Lebashe Investment Group (Pty) Ltd and Tshepo Mahoele;

[2.3] a dispute between SARS and the first, third and fourth applicants;

[2.4] a dispute between the first applicant and SARS and Regiments Capital (Pty) Ltd *(in liquidation);*

[2.5] a dispute between the first applicant and the City of Johannesburg;

[2.6] a dispute between the first applicant and the provisional liquidators of Regiments Capital (Pty) Ltd (*in liquidation*);

[2.7] a dispute between the third and fourth applicants and Capitec Bank Holdings Limited; and,

[2.8] the present application.

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[3] Furthermore, the applicants seek an order authorising the curator to make intercompany loans between the applicants in order to allow for the payment of the legal costs, subject to the approval by the directors of the applicable applicants.

The restraint and its consequences

[4] The restraint is wide in ambit. It is captured in paragraph 5 of the Order which reads:

> 'The defendants, respondents and any other person with knowledge of the order are hereby prohibited from dealing in any manner with the property except as required or permitted by this order.'

[5] By restraining the applicants[2] from 'dealing in any manner with the property' of the applicants the Order has effectively denuded them of all power and control over their property. The phrase 'dealing in' is not defined in the Order. To attribute a sensible and business-like meaning to it, it is necessary to have regard to the entire Order, and if necessary the purpose and object of POCA.

[6] The applicants being companies are, in terms of s 66(1) of the Companies Act 71 of 2008, managed by their board of directors.[3] The boards of the applicants have been denuded of all power conferred upon them by s 66(1) of the Companies Act. Instead, the power is now placed in the hands of the curator. He is to take the property of the applicants 'into his possession or under his control, to take care of such property and to administer it.'[4] He is then clothed with extensive powers both in relation to acquiring possession and control of the property, and in relation to administering it. He is entitled to 'let any immovable property under restraint', to deal with any funds in any

[2] The first applicant is listed as the fifth defendant in the Order, the second applicant is listed as the sixth defendant, the third applicant is listed as the first respondent and fourth applicant is listed as the second respondent.

[3] Section 66(1) of the Companies Act provides as follows:

'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

[4] Paragraph 8 of the Order

bank account of the applicants, 'to deal with all the property in terms of' the Order as if he himself were its owner or holder', and to act as shareholder for any shareholdings of the applicants.[5] He is entitled to authorise any person to act on his behalf, or to exercise any powers on his behalf and to engage any agents, sub-contractors or service providers to do anything necessary[6] - as long as it falls within the scope of administering the property. However, there is an Annexure B to the Order, the contents of which lie at the core of the controversy in this matter. It is designated 'Financial controls on expenditure incurred by the [curator] in terms of [POCA].' Paragraph 1 of Annexure B empowers the curator to 'assess cost and other implications of holding the property and determine the most appropriate management of each asset, including the cost of administering the asset …' The power is to be exercised 'in consultation with the representative of the [NDPP]'. The rest of the contents of Annexure B lay down certain obligatory processes the curator is to follow when administering and managing the property.

[7] The effect of the Order in its entirety is the removal of all the power of the boards of the applicants, and the transferring of that power to the curator – albeit with certain constraints being placed on the curator regarding expenditures that he may wish or have to shoulder. The power the boards had prior to the Order is now bestowed upon the curator. Put differently, the effect of the Order is to place the applicants' property beyond the control of the boards and place it into the hands of the curator.[7]

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[5] Paragraphs 10, 12, 15 and 16 of the Order
[6] Paragraph 17 of the Order
[7] *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as amicus curiae)* 2007 (3) SA 484 (CC) at [12]

[8] Read as a whole then, the phrase 'dealing in' can only mean conducting the business of or engaging in the affairs of' the property. The applicants are thus prohibited from engaging in the affairs of the property or conducting any business with or on behalf of the property.

Locus standi (legal standing)

[9] *Locus standi* refers to the right or standing of a legal person to bring or defend an application or action in a court. As the Order is issued against all the applicants, the issue of whether they have the necessary *locus standi* to bring the application, would, I believe, have to be considered. The issue was not raised by the NDPP. As a result, one week prior to the hearing of the matter I issued a directive to the parties calling upon them to prepare for and make submissions on two issues, *viz* (i) can the court *mero motu* raise the issue of *locus standi*? And, (ii) if so, do the applicants in this matter have the necessary *locus standi* to bring the application? In response, very detailed and helpful submissions were received from both sets of counsel, for which I am grateful and take this opportunity to thank them.

Court's power to raise an issue *mero motu*

[10] The law with regard to the court's power to raise an issue *mero motu* is succinctly pronounced in the following *dictum*:

> '[35] It is trite that courts are bound by the issues that the litigating parties raise. However, a court can raise an issue *mero motu* where (i) raising it is necessary to dispose of the matter, and (ii) it is in the

> interests of justice to do so, which depends on the circumstances at hand.'[8]

[11] At the same time, the court is not just entitled but obliged to raise an issue of law *mero motu* in order to avoid a failure of justice caused by an incorrect application of law. The principle has been enunciated as follows:

> 'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon.'[9]

Is the issue of *locus standi* a legal one?

[12] The issue of *locus standi* is a constitutional one.[10] At the same time, it is an issue separate from the merits, and may be dispositive of 'a litigant's claim.'[11] The merits are very often fact-dependent. In fact, they very rarely are not. If a litigant fails to show it has *locus standi*,

> '…the Court should, as a general rule, dispose of the matter without entering the merits and that it should only enter the merits in exceptional cases or where the public interest really cries out for that.'[12]

[13] The issue of *locus standi* is, on these principles, a legal one. The proof thereof, however, is a factual one. In this case the facts, as is shown below,

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[8] *Booi v Amathole District Municipality and Others* 2022 (3) BCLR 265 (CC) at [35]. *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* 2021 (3) SA 246 (CC) at [58], *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009 (4) SA 222 (CC) at [40] – [41]

[9] *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) at [67]

[10] *Areva NP Incorporated in France v Eskom Holdings SOC Limited and others* 2017 (6) SA 621 (CC) at [26]

[11] Id at [40]

[12] Id at [41]

are common cause and uncomplicated. It is a constitutional issue which may be dispositive of the applicants' case. Thus, this court is entitled to raise the issue *mero motu*. Accordingly, it is in the interests of justice that it be raised.

Do the applicants have *locus standi*?

[14] The application is brought by the applicants through the passing of resolutions by each of their boards. The board of each applicant is comprised of the same two individuals: Messrs Magendheran Pillay and Litha Nyhonyha, both of whom are cited as defendants in the Order.[13] They are restrained from dealing in the property. The very purpose of the Order insofar as it relates to them is to denude them of effective control over the applicants. [14]

[15] They held four board meetings - one for each of the applicants – on 25 July 2022, wherein they passed the same resolution allowing for the institution of this application and the appointment of their present attorneys, Smit Sewgoolam Inc. (Smit Sewgoolam),[15] to represent the applicants in this matter. By denuding the applicants of all powers over the restrained property – which is all the property of the applicants - and transferring them to the curator, the Order has removed all the powers of the four boards. The boards have been specifically restrained from 'dealing in any manner with the property'. By resolving to institute proceedings they are dealing in the property. And, more importantly, by appointing Smit Sewgoolam they have taken a decision to incur liabilities for the account of each of the applicants.

[13] Mr Plillay is cited as the second defendant and Mr Nyhoyha is cited as the third defendant
[14] See *Phillips and Others v van den Heever NO and others* 2004 (2) SACR 283 (W) at [18] – [19].
[15] Smit Sewgoolam Inc are also the attorneys for the respective applicant(s) involved in the litigation referred to in [1.1] above

Again, this constitutes dealing in the property. The resolutions, and especially the appointment of Smit Sewgoolam, are therefore unlawful and invalid. Only the curator is entitled to deal in the property of the applicants, and hence only he is entitled to commence litigation on behalf of the applicants. The power entitling him to do that is conferred upon him by paragraphs 15 and 17 of the Order. Put differently, by denuding them of all power to engage in the affairs of their businesses or to conduct their businesses, the court has taken away their legal standing. In more colourful language their legal standing has been amputated by the Order.

[16] It follows that, as the application is brought by parties that are not entitled to bring it, the applicants have no *locus standi* in these proceedings.

[17] The disagreement between the applicants and the NDPP revolves around the meaning of two paragraphs in the Order: paragraphs 11 and 19. On the finding that the applicants lack *locus standi* the resolution of that dispute will have to wait for another day. Lest it be brought with possibly some new or different facts, it is best to say nothing of that dispute now.

Costs

[18] Costs should follow the result.

Order

[19] The following order is made:

a. The application is dismissed.

b. The applicants are to jointly and severally pay the costs of the application, the one paying the other is to be absolved.

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Vally J
Gauteng High Court, Johannesburg

Date of hearing:	15 November 2023
Date of judgment:	1 December 2023
For the applicant:	DJ Smit with T Scott
Instructed by:	Smit Sewgoolam Inc
For the respondents:	G Budlender (SC) with K Saller
Instructed by:	Seneke Attorneys (for the third respondent)